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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 02/18/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/055,255

Applicant(s)

HAMILTON, ROBERT DOUGLAS

Examiner

Andrew J. Fischer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 24 November 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-38 is/are pending in the application.
- 4a) Of the above claim(s) 33-38 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Acknowledgements

1. The amendment filed November 24, 2003 (Paper No. 6) is acknowledged. Accordingly claims 1-36 remain pending.
2. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologizes for these errors.
3. The examiner for this application has changed. Please indicated Examiner Andrew J. Fischer as the examiner of record in all future correspondences.

Restriction

4. Newly submitted claims 33-38 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:
 - I. Claims 1-32, drawn to a method of providing content, classified in class 705, subclass 27.
 - II. Claims 33-38, drawn to a method of allowing a customer to receive content, classified in class 725, subclass 37.

The inventions are distinct, each from the other because of the following reasons:

5. Inventions I and II are related as subcombinations disclosed as usable together in a single combination. The subcombinations are distinct from each other if they are shown to be separately usable. In the instant case, invention II has separate utility such as order tracking. See MPEP § 806.05(d).

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6. Because these inventions are distinct for the reasons given above, because these inventions have acquired a separate status in the art as shown by their different classification and divergent subject matter, and because the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.

7. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 33-38 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Drawings

8. The drawings are objected to under 37 C.F.R. §1.83(a). The drawings must show every feature of the invention specified in the claims. No new matter allowed. The following must be shown or the features canceled from the claim(s):

- (1) The “interfaces comprises an HTML page” as recited in claim 13
- (2) The “computing device comprises a personal digital assistant” as recited in claim 21
- (3) The “computing device comprises a cellular telephone” as recited in claim 22.

9. The Examiner notes the claims are replete with the above drawing errors. All method steps recited in the claims are clearly not shown in the drawings. The Examiner highly recommends Applicant review all pending claims to ensure that every structural feature claimed

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is shown in the drawings. Additionally, a proposed drawing correction or corrected drawings are required in reply to this Office action to avoid abandonment of the application.

Claim Rejections - 35 USC § 112

10. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-27 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are replete with errors. Some examples follow.

i. In claim 1, it is unclear as to whom the “remotely tuning” is performed.

Remote to the customer or remote to the server cable company?

ii. In claim 2, it is unclear if “an indicator” is the same or different from “an indicator” as recited in claim 1. If Applicant’s specification permits, the

Examiner suggests ‘a first indicator’ and ‘a second indicator.’

iii. In claim 14, it is unclear as to what “in response thereto” Applicant is referring to.

iv. Claim 26 is indefinite because it contains more than computer instructions making the scope of claim 26 unclear.

11. The Examiner finds that because the claims are rejected as being indefinite under 35 U.S.C. §112 2nd paragraph, it is impossible to properly construe claim scope at this time. See *Honeywell International Inc. v. ITC*, 68 USPQ2d 1023, 1030 (Fed. Cir. 2003) (“Because the claims are indefinite, the claims, by definition, cannot be construed.”). However, in accordance

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with MPEP §2173.06 and the USPTO's policy of trying to advance prosecution by providing art rejections even though these claim are indefinite, the claims are construed and the art is applied *as much as practically possible*. Upon appropriate resolution of the 35 U.S.C. §112 rejections, the claims will be reinterpreted to access claim scope and if not allowable, have the best prior art applied to the claims. As noted below, Applicant(s) are invited to contact the Examiner if additional assistance is needed.

Claim Rejections - 35 USC § 102

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

13. Claims 1-9, 11-32, as understood by the Examiner, are rejected under 35 U.S.C. 102(b) as being anticipated by Mourad et. al. (U.S. 6,078,961)(“Mourad”). Mourad discloses the claimed invention including remotely tuning one of said at least tunable media receivers over the cable television network (receiver 2).

14. Claims 1-9, 11-32, as understood by the Examiner, are rejected under 35 U.S.C. 102(b) as being anticipated by Handelman (U.S. 5,715,315)(“Handelman”).

Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. Claims 1-9, 11-32, as understood by the Examiner, are rejected under 35 U.S.C. 103(a) as being unpatentable over Mourad in view of Baker et. al. (U.S. 5,583,561)(“Baker”).¹ It is the Examiner’s principle position that the claims are anticipated because of the inherencies noted above.

However if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Mourad as taught by Baker to include the generic elements of a cable television system. Such a modification would have helped lower the cost of service per view for selective retrieval and distribution of digital video.

17. It is the Examiner’s position that claim 27 is not patentably distinct from claim 1. Therefore a restriction at this time is improper.

18. Claims 10, as understood by the Examiner, are rejected under 35 U.S.C. 103(a) as being unpatentable over Mourad in view of Geile et. al. (U.S. 6,279,158 B1)(“Geile”). Mourad discloses as discussed above but does not directly disclose bandwidth manipulation. Geile teaches indicators of bandwidth allocation.

¹ See MPEP §2112 expressly authorizing alternative §102/§103 rejections when the question of inherency is present in the anticipation rejection.

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Therefore, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Mourad as taught be Geile to include indicators of bandwidth allocation. Such a modification would have helped maximize the bandwidth.

19. After careful review of the specification and prosecution history, the Examiner is unaware of any desire—either expressly or implicitly—by Applicant to be his own lexicographer and to define a claim term to have a meaning other than its ordinary and accustomed meaning. Therefore, the Examiner starts with the heavy presumption that all claim limitations are given their ordinary and accustomed meaning. See *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 1268, 59 USPQ2d 1865, 1870 (Fed. Cir. 2001) (“[T]here is a heavy presumption in favor of the ordinary meaning of claim language as understood by one of ordinary skill in the art.”); *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2002) (There is a “heavy presumption that a claim term carries its ordinary and customary meaning.”). See also MPEP.2111.01 and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).²

In accordance with the ordinary and accustomed meaning presumption, during examination the claims are interpreted with their “broadest reasonable interpretation” *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). See also MPEP.2111.

However, if Applicant disagrees with the Examiner and has either (a) already used lexicography or (b) wishes to use lexicography and therefore (under either (a) or (b)) desires a

² It is the Examiner’s position that “plain meaning” and “ordinary and accustomed meaning” are synonymous. See e.g. *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001) (“[A]ll terms in a patent claim are to be given their plain, ordinary and accustomed meaning . . .”).

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claim limitation to have a meaning other than its ordinary and accustomed meaning, the Examiner respectfully requests Applicant in his next response to expressly indicate³ the claim limitation at issue and to show where in the specification or prosecution history the limitation is defined. Such definitions must be clearly stated in the specification or file history. *Bell Atlantic*, 262 F.3d at 1268, 59 USPQ2d at 1870, (“[I]n redefining the meaning of particular claim terms away from the ordinary meaning, the intrinsic evidence must ‘clearly set forth’ or ‘clearly redefine’ a claim term so as to put one reasonably skilled in the art on notice that the patentee intended to so redefine the claim term”).⁴ The Examiner cautions that no new matter is allowed. Applicant is reminded that failure by Applicant in his next response to properly traverse this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered a desire by Applicant to forgo lexicography in this application and to continue having

³ “Absent an *express intent* to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning. [Emphasis added.]” *Wenger Manufacturing Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225, 1232, 57 USPQ2d 1679, 1684 (Fed. Cir. 2001) (citations and quotations omitted). “In the absence of an *express intent* to impart a novel meaning to claim terms, an inventor’s claim terms take on their ordinary meaning. We indulge a heavy presumption that a claim term carries its ordinary and customary meaning. [Emphasis added.]” *Teleflex Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002) (citations and quotations omitted).

⁴ See also *Vitronics Corp. v. Conceptiontronic, Inc.*, 90 F.3d 1576, 1582, 39 USPQ2d 1573, 1576 (Fed. Cir. 1996), (“[A] patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, *as long as* the special definition of the term is *clearly stated* in the patent specification or file history. [Emphasis added.]”); *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998) (“Such special meaning, however, must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention.”). See also MPEP §2111.01, subsection titled “Applicant May Be Own Lexicographer” and MPEP §2173.05(a) titled “New Terminology.”

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the claims interpreted with their broadest reasonable interpretation.⁵ Additionally, it is the Examiner's position that the above requirements are reasonable.⁶ Unless expressly noted otherwise by the Examiner, the preceding discussion on claim interpretation principles applies to all examined claims currently pending.

20. To the extent that the Examiner's interpretations are in dispute with Applicant's interpretations, the Examiner hereby adopts the following definitions—under the broadest reasonable interpretation standard—in all his claim interpretations.⁷ Moreover, while the following list is provided in accordance with *In re Morris*, the definitions are a guide to claim terminology since claim terms must be interpreted in context of the surrounding claim language.⁸ Finally, the following list is not intended to be exhaustive in any way:

⁵ See 37 C.F.R. §1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]"

⁶ The Examiner's requirements on this matter are reasonable on at least two separate and independent grounds. First, the Examiner's requirements are simply an express request for clarification of how Applicants intend their claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicants is not inadvertently overlooked by the Examiner. Second, the requirements are reasonable in view of the USPTO's goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO's The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed February 11, 2004).

⁷ While most definitions are cited because these terms are found in the claims, the Examiner may have provided additional definitions to help interpret words, phrases, or concepts found in the definitions themselves or in the prior art.

⁸ See e.g. *Brookhill-Wilk 1 LLC v. Intuitive Surgical Inc.*, 334 F.3d 1294, 1300, 67 USPQ2d 1132, 1137 (Fed. Cir. 2003) (abstract dictionary definitions are not alone determinative; "resort must always be made to the surrounding text of the claims in question").

- a. **Database** “A file composed of records, each containing fields together with a set of operations for searching, sorting, recombining and other functions.” Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997.⁹
- b. **Server**: “2. On the Internet or other network, a computer or program that responds to commands from a client.” *Id.* **Client**: “3. On a local area network or Internet, a computer that accesses shared network resources provided by another computer (called a *server*).” *Id.* **Computer**: “Any machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” *Id.*
- c. **Channel** “2. In communications, a medium for transferring information. Depending upon its type, a communications channel can carry information (data, sound, and or video) in either analog or digital form. A communications channel can be a physical link such a cable connecting two stations in a network, or it can consist of some electromagnetic transmission on one or more frequencies within a bandwidth in the electromagnetic spectrum, as in radio or television, or in optical, microwave, or voice-grade communication.” *Id.*
- d. **Data** “Plural of the Latin *datum*, meaning an item of information. In practice, data is often use for the singular as well as plural the form of the noun.” *Id.*

⁹ Based upon Applicant’s disclosure, the art now of record, and the knowledge of one of ordinary skill in this art as determined by the factors discussed in MPEP §2141.03 (where practical), the Examiner finds that the *Microsoft Press Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See *e.g. Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used the *Microsoft Press Computer Dictionary* (3d ed.) as “a technical dictionary” to define the term “flag.” See also *In re Barr*, 444 F.2d 588, 170 USPQ 330 (CCPA 1971)(noting that its appropriate to use technical dictionaries in order to ascertain the meaning of a term of art) and MPEP §2173.05(a) titled ‘New Terminology.’

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e. **Network:** "A group of computers and associated network devices that are connected by communications facilities." *Id.*

21. Functional recitation(s) using the word "to" or "for" (e.g. "to receive said content over said cable television network" as recited in claim 1) have been considered but given less patentable weight¹⁰ because they fail to add any steps and are thereby regarded as intended use language. A recitation of the intended use of the claimed invention must result in additional steps. See *Bristol-Myers Squibb Co. v. Ben Venue Laboratories, Inc.*, 246 F.3d 1368, 1375-76, 58 USPQ2d 1508, 1513 (Fed. Cir. 2001) (Where the language in a method claim states only a purpose and intended result, the expression does not result in a manipulative difference in the steps of the claim.).

Response to Arguments

22. Applicant's arguments filed with his amendment on November 24, 2003 (Paper No. 6) have been fully considered but they are not persuasive.

23. Applicant argues that "[n]o remote media receiver needs to be tuned."¹¹ The Examiner respectfully disagrees. Receiver (2) is tuned in the conventional manner.

24. Applicant also argues that "viewing the content on a media receiver different from the computing device is not contemplated."¹² Whether or not this is true, this limitation is not found in at least claim 1.

¹⁰ See e.g. *In re Gulack*, 703 F.2d 1381, 217 USPQ 401, 404 (Fed. Cir. 1983)(stating that although all limitations must be considered, not all limitations are entitled to patentable weight).

¹¹ Applicant's Remarks, Paper No. 6, Page 9, ¶3.

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25. Regarding Applicant's request for explicit disclosure, the Examiner knows of no such requirements.

Conclusion

26. The following references are considered pertinent to Applicant(s)' disclosure: Yasuki et. al. (U.S. 6,285,407 B1); Varma et. al. (U.S. 6,275,497 B1); Gardell et. al. (U.S. 6,049,831 A); Mathews, III et. al. (U.S. 6,025,837 A); Kikinis (U.S. 5,929,849 A); Broadwin et. al. (U.S. 5,903,816); York (U.S. 5,850,340); Kunkel et. al. (U.S. 5,961,603); and Chiu et. al. (U.S. 5,784,597 A).

27. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8th Edition, Rev 1, February 2003. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

28. In accordance with *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the references How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla are additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Each reference is cited in its entirety. Moreover, because these three references are directed towards beginners (see e.g. "User Level Beginning . . ."), because of the references' basic content (which is self-evident upon review of the references), and after further review of the entire application and all the art now of record in

¹² *Id.*

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conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that these three references are primarily directed towards those of low skill in this art.

Because these three references are directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within these three references.

29. Also in accordance with *Lee*, the Examiner finds that the reference Introduction to Financial Accounting, Revised 3rd Ed. by Charles T. Horngren et. al. is additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. The reference is cited in its entirety. Horngren describes basic financial and managerial accounting practices. Because of the references' basic content, and after further review of the entire record including the prior art now of record in conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that the reference is primarily directed towards those of low skill in this art. Because the reference is directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within the reference.

30. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has again provided Applicants with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. The Examiner notes and thanks Applicant for his "Remarks" (Paper No. 6 beginning on page 9) traversing the Examiner's positions on various points. If Applicant disagrees with any additional factual determination or

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legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,¹³ the Examiner respectfully reminds Applicant to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) in his next properly filed response. By addressing these issues now, matters where the Examiner and Applicant agree can be eliminated allowing the Examiner and Applicant to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicant has any questions regarding the Examiner's positions or has other questions regarding this communication or even previous communications, Applicant is strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. The fax number for facsimile responses is now (703) 872-9306.



Andrew J. Fischer
Patent Examiner
Art Unit 3627

AJF
February 7, 2004

¹³ *E.g.*, if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.